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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of GUINN and JACQUELINE HODGES.	
JACQUELINE NEVELS, Respondent, v. GUINN HODGES, Appellant.	G040160 (Super. Ct. No. 04D009166) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Salvador Sarmiento, Judge. Reversed and remanded, with directions.

Guinn Hodges, in pro. per., for Appellant.

Jacqueline Nevels, in pro. per., for Respondent.

* * *

Quinn Hodges appeals from the trial court's orders denying his motions under Code of Civil Procedure section 473, subdivision (b),[1] to vacate entry of judgment against him on reserved matters in his divorce from Jacqueline Hodges, now known as Jacqueline Nevels. In an earlier, successful writ petition to this court, Hodges secured a writ of mandate requiring the trial court to allow Hodges's attorney to represent him at trial though the attorney also would testify as a witness. (*Hodges v. Superior Court* (Mar. 29, 2007, G038101) [nonpub. opn.] (*Hodges*).) Following remittitur, however, the trial court entered an order requiring that the trial proceed by way of written declarations and argument submitted to the court, without witness testimony. The court's order set a timetable for the written submissions and, after Hodges failed to file a declaration, the court entered judgment against him on his earlier requests for spousal support, division of community property and debts, matters concerning health insurance, and attorney fees.

We conclude the trial court erred in denying Hodges's motions to vacate after he established he had no notice of entry of the judgment or the postremittitur order specifying the trial would be conducted based on written submissions. Because the trial court's order for trial by declaration conflicts with our writ of mandate providing for a trial with the assistance of counsel, even if counsel would also testify as a witness, we remand for a trial on the merits with witness testimony, unless the parties waive it.

I

FACTUAL AND PROCEDURAL BACKGROUND

The parties appeared for trial on December 18, 2006. As recited in our earlier opinion: "When the cause was called," Hodges, "who is not an attorney, asked the court to permit attorney Ernest Calhoon to assist him in presenting his case." Hodges

[1] All further unlabeled section references are to the Code of Civil Procedure. For ease of reference, we will refer to section 473, subdivision (b), as section 473(b).

"freely acknowledged Calhoon would also be called as a witness on his behalf, but the court never inquired as to the nature of Calhoon's proposed testimony. Rather, it gave [Hodges] a Hobson's choice: Calhoon could either be a witness in the proceeding or he could act as [Hodges]'s counsel but he would not be permitted to do both. When [Hodges] balked at having to make such an election, the court deemed Calhoon a witness and ordered him and the other witnesses in the proceeding from the courtroom." (*Hodges*, *supra*, G038101.) We explained in our opinion granting the writ petition that while an attorney generally may not represent a client and testify as a witness in the same proceeding before a jury, the rule does not apply to court trials. (*Ibid*.)

In her opposition to the writ petition, Nevels suggested the matter was moot because, after the trial court excluded Calhoon from the courtroom, she and Hodges stipulated "to have the matter heard by the court by written argument and declaration." (*Hodges*, *supra*, G038101.) But we concluded the matter was not moot since Hodges "agreed to that alternative procedure only because he was concerned about the wisdom of proceeding to trial on the primary issue without the assistance of counsel." (*Ibid.*)

We filed our opinion granting Hodges's writ petition on March 29, 2007. The week before, on March 22, 2007, the trial court had entered an order with a timetable for the parties to submit, pursuant to their stipulation, written declarations and argument on the matters to be tried.

At or near the inception of the case, Hodges had filed with the court one of Calhoon's post office boxes as his address for service of all notices, pleadings, or other matters connected with the case. In a pretrial hearing, however, Hodges orally notified the court and Nevel's attorney of an address change, furnishing his home address in place of Calhoon's post office box. The court clerk dutifully mailed notice of its March 22,

2007, order to Hodges's home address. The court clerk mailed an additional notice of the order to Calhoon's post office box. The clerk also mailed notice to Nevel's attorney.

On May 17, 2007, uncertain whether a formal remittitur would issue following our writ opinion, the trial court vacated its March 22, 2007, order. But the trial court determined it would still proceed with the trial by written declarations instead of witness testimony, and set a new timetable for submission of declarations. The court clerk mailed notice of the order only to Calhoon's post office box and not to Hodges's home address. The clerk also mailed notice to Nevel's attorney.

When our remittitur issued on June 6, 2007, the trial court again vacated its declarations timetable, but again determined trial would proceed by declaration only, without witness testimony. The trial court filed a minute order to this effect on June 26, 2007. The court clerk again mailed notice of the order only to Calhoon's post office box and not to Hodges's home address. The clerk also mailed notice to Nevel's attorney.

Neither Hodges, nor Nevel submitted declarations. Consequently, noting "[n]o new pleadings have been filed with this court," the trial court entered judgment on August 30, 2007, as follows: "**Spousal Support:** No additional evidence was received. Prior evidence showed that this had been a short-term marriage of 1 year, 11 months. At the time of the trial the parties had been separated over 3 years with no prior support orders. The court, therefore, terminates its jurisdiction over spousal support. [¶] **Community Property and Debts:** The court received no evidence concerning these issues, therefore the court make[s] no orders regarding this issue. [¶] **Health Insurance:** The court received no evidence that would show [Nevels] acted in any fa[s]hion to harm [Hodges]'s abil[]ity to receive health insurance coverage. Court denies any relief in this area. [¶] **Attorney's Fees:** No evidence being received, the court makes no orders

regarding this issue." The court clerk mailed notice only to Calhoon's post office box and not to Hodges's home address. The clerk also mailed notice to Nevel's attorney.

On November 28, 2007, Hodges filed a motion under section 473(b) to vacate the judgment and the trial court's postremittitur order setting the declarations timetable, on grounds he had no notice of either because of mistake, inadvertence, surprise, or excusable neglect. Hodges acknowledged he mistakenly failed to file a written notice of change of address with the court (Cal. Rules of Court, rule 2.200) when he substituted his home address for Calhoon's post office box. He nevertheless was surprised by entry of the postremittitur order and judgment because, after orally notifying the court of his address change, he had received notice of the March 22, 2007, order at his home address, and expected similar notice of any subsequent orders or the judgment. He explained he had not inquired on the status of court proceedings since March because he had been in and out of the hospital and doctor's offices with pneumonia and a new cancer diagnosis, "not the one from which I previously survived." He had not been in contact with Calhoon until November 2007, when he sent Calhoon an e-mail upon discharge from the hospital. According to Hodges, Calhoon had not sent Hodges copies of any orders or the judgment because Calhoon believed the court merely had sent him courtesy notices duplicating identical notices also sent to Hodges. Additionally, Calhoon had lost for a time the key to the post office box he assigned to Hodges.

The trial court rejected Hodges's motion to vacate on February 1, 2008, observing that "it is your responsibility to notify the court of change of address." Hodges filed a subsequent motion to vacate on February 26, 2008, this time including Calhoon's "Attorney Affidavit of Fault Per CCP Section 473." In his affidavit, Calhoon confirmed he failed to notify Hodges of court notices because he believed the court was merely

providing courtesy copies of notices sent directly to Hodges, as had been the case with the March 22, 2007, order. He also confirmed that while moving his main office and opening satellite offices, "I misplaced/lost the key to the above-mentioned P.O. Box and I was unable to access it for a period of time." The trial court denied Hodges's second motion to vacate because "Mr. Calhoon has never been the attorney of record, so there is no basis for that motion." Hodges now appeals denial of his section 473(b) motions. (See *Huh v. Wang* (2007) 158 Cal.App.4th 1406 [order denying motion to vacate under § 473(b) is appealable].)

II

DISCUSSION

Section 473(b) provides the court *may* relieve a party from a "judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The statute also provides, however, that the court "*shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any ... resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Italics added.)

Thus, section 473(b) has both a discretionary and a mandatory element. We afford appropriate leeway to the trial court's discretion to deny relief where a party rather than the attorney is at fault. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.) That discretion, however, is subject to careful scrutiny because of the strong public policy favoring trial on the merits. (*Ibid.*) Moreover, the trial court's exercise of discretion

under section 473(b) must be a "reasoned choice" considering all the evidence. (*Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 339.) Given the important interests at stake, the discretion invested in the trial court "'"'is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.'"'" (*Rivercourt Co., Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1480.) And where the attorney is at fault, the trial court has no discretion to deny the party mandatory relief, even if the attorney's mistake, inadvertence, surprise, or neglect is *not* reasonable. (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 63.)

Here, Hodges established that his mistake in failing to file written notice of his address change was reasonable. While the omission may have been unreasonable at the outset because of the unambiguous rule requiring written notice of address changes (Cal. Rules of Court, rule 2.200; see *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267 [self-represented litigant's inexperience does not render mistakes excusable]), once Hodges received notice from the court clerk of the March 22, 2007, order at his home address, it was reasonable to assume the court was aware of his address change. Because the longstanding policy preference for trial on the merits requires that doubts be resolved in favor of the moving party (see, e.g., *Berri v. Rogero* (1914) 168 Cal. 736, 740), we conclude the trial court erred in denying Hodges's motion.

Our conclusion that the judgment must be vacated is bolstered by Calhoon's affidavit of fault attached to Hodges's second motion. The trial court denied the motion because Calhoon was never Hodges's attorney of record, but that formality is not required. (*SJP Ltd. Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 517-518.) The attorney's mistake or neglect need not be the sole cause of default entry of

judgment so long as it was a "proximate cause," i.e., a cause in fact. (*Milton v. Perceptual Develoment Corp.* (1997) 53 Cal.App.4th 861, 867; *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1447.) Here, there is no reason to doubt Calhoon's failure to notify Hodges of the postremittitur order setting a timetable for submitting declarations and of entry of judgment prevented Hodges from responding to either.

Our conclusion does not change even if Calhoon is viewed as Hodges's agent for purposes of receiving notice, rather than his attorney. As an agent, any fault on Calhoon's part would be attributable to Hodges, but there is no basis for discounting Calhoon's belief he was receiving courtesy copies of notices also sent to Hodges, since the March 22, 2007, order identified both Hodges and Calhoon as individuals receiving notice. Accordingly, because Calhoon's mistaken belief Hodges received notice was reasonable, the policy in favor of trial on the merits called for the trial court to grant Hodges relief from the judgment, since he established lack of notice of either the judgment or the briefing order leading to the default judgment. Thus, whether Calhoon's mistake is viewed under the mandatory or discretionary prongs of section 473(b), the trial court should have granted the motion to ensure the matter was decided on its merits.

On remand, the trial court shall restore the matter to the trial calendar. Consistent with our earlier opinion granting Hodges writ relief, the parties are entitled to the assistance of counsel of their choosing. Absent a new stipulation to proceed by written declarations and argument, they are also entitled to present witness testimony. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1355; see generally Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 5:492, p. 5-192, original italics [under *Elkins*, in contrast to motion practice, in "*contested trials* leading to

a *judgment*: Courts may not prohibit oral testimony or require the parties to present their case at trial by affidavits or declarations"]; compare *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 485 [family court may require, in deciding motions, that parties present their positions exclusively by declarations].)

III

DISPOSITION

The trial court's orders denying Hodges's section 473(b) motions are reversed, and the judgment is vacated. The matter is remanded for trial on the merits, with the parties entitled to the assistance of counsel and to present witness testimony, absent waiver of either right. In the interest of justice, each party shall bear its own costs for this appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.